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In the

Supreme Court of the United States

October Term, 1958

No. 797

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO AND MAGIE L. STONE,
Petitioners

v.

THE UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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In the

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No. .....

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO AND MAGIE L. STONE,
Petitioners

v.

THE UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on January 23, 1959.

OPINIONS BELOW

The opinion of the court of appeals in this case (A. 1; R. 5) is not reported as yet.

The opinion of the United States District Court for the Eastern District of Virginia is not reported (A. 8).

The opinion of this Court on its previous consideration of this case upon a different point is reported at 356 U. S. 595.

JURISDICTION

The judgment of the Court of Appeals in this case was entered on January 23, 1959 (A. 7). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). On February 24, 1959, the Court of Appeals entered an order extending for a period of 30 days from that date the period in which this petition might be filed (A. 8).

QUESTION PRESENTED

Is the interpretation of the False Claims Act in this case, as applied by the district court and affirmed by the court of appeals, constitutional under the Fifth and Eighth Amendments of the Constitution of the United States when it results in a recovery by the United States Government of $60,000.00 in forfeitures where there is an affirmative finding of fact by the district court that the government has not been damaged in any way?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. CONST. amend. V.

CAPITAL CRIMES: DUE PROCESS

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. CONST. amend. VIII.

EXCESSIVE BAIL, FINES, PUNISHMENTS

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 3490 of the Revised Statutes of 1878, 12 Stat. 696, 698:

"Sec. 3490 — Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the services of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'Crimes', shall forfeit and pay to the United States the sum of Two Thousand Dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Section 5438 of the Revised Statutes of 1878, 12 Stat. 698:

"Sec. 5438 — Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, . . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

STATEMENT

The jurisdiction of the district court in the initial proceedings in this case was based upon the False Claims Act, quoted above.

The pertinent facts in this case will be found in the findings of fact of the district court which have never been controverted by either side in all proceedings following that decision.

These findings were in pertinent part as follows (R. 1a):

"The Court having heard the evidence in the above case finds as a fact:

1. The defendant, Cato Bros., Incorporated, is a corporation organized and existing under the laws of the State of Virginia, doing business in Emporia, Virginia.

2. The defendant, Wilfred R. Cato, is a resident of Emporia, Virginia, and was at all times mentioned herein President and a Director of Cato Bros., Incorporated.

3. The defendant, William R. Cato, is a resident of Emporia, Virginia, and was at all times mentioned herein Secretary and a Director of Cato Bros., Incorporated.

4. The defendant, Magie L. Dunn (nee: Stone), is a resident of Emporia, Virginia, and was during the year 1948, Treasurer of Cato Bros., Incorporated.

5. None of the defendants mentioned herein is, nor at any time mentioned herein was, in the military or naval service of the United States or in the militia called into or actually employed in the service of the United States.

6. The Commodity Credit Corporation is a body corporate whose entire capital stock is subscribed by

the United States of America, and it is an agency and instrumentality of the United States.

7. On August 3, 1948, the Commodity Credit Corporation and the defendant, Cato Bros., Incorporated, entered into a Leading Agency Agreement, under which the defendant Cato Bros., Incorporated, was authorized to make loans to producers of 1948 crop cotton in accordance with the provisions of the said agreement.

8. During the year 1948, the defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (nee: Stone), did submit to the Commodity Credit Corporation, fifty-five (55) letters, transmitting a total of One Thousand One Hundred Seventy-Six (1,176) notes representing loans made pursuant to the Leading Agency Agreement.

9. The defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato, and Magie L. Dunn (nee: Stone), transmitted to the Commodity Credit Corporation in thirty (30) of the aforementioned letters of transmittal a total of Seven Hundred Forty-eight (748) notes, in each of which letters there was at least one note covering cotton not actually produced by the person who signed the note as producer, and thus made and caused to be presented for payment to persons in the civil service of the United States, thirty (30) claims upon the Commodity Credit Corporation knowing the said claims to be false.

10. The cotton represented by the aforesaid improper notes was held by the Commodity Credit Corporation for an unreasonably long time, during which time it could have disposed of the said cotton at a profit.

11. The Commodity Credit Corporation failed to accept the offer of the defendants to repurchase the cotton at the price paid for the cotton by the said Corporation.

* * *"

From these findings of fact the Court concluded as a matter of law as follows:

"* * *

"4. The plaintiff has not suffered any legally recoverable damages due to the actions of the defendants.

5. The recovery by plaintiff of Sixty Thousand Dollars ($60,000.00) in forfeitures is Constitutional as a civil remedy, even though plaintiff has not suffered any legally recoverable damages due to the actions of the defendants.

* * *"

REASON FOR GRANTING THE WRIT

In this case the court of appeals has decided an important question of federal law which should be settled by this Court, as this decision, it is submitted by petitioners, is in conflict with the prior decisions of this court.

ARGUMENT

As Applied in This Case, the False Claims Act Violates the Fifth Amendment of the Constitution as a Denial of Due Process and Inflicts an Excessive Fine Prohibited by the Eighth Amendment.

In the present posture of this case the judgment of the district court, unless reversed, requires petitioners to pay the sum of $60,000.00 to the United States even though the district court has made an affirmative finding of fact that the government has not suffered and could not recover any damages. Since the lower court's construction of the False Claims Act reaches this result in this case, it is the contention of petitioners that the application of the Act is uncon-

stitutional here as a taking of petitioners' property without due process of law.

It has been settled beyond peradventure of a doubt by this Court that the False Claims Act (Sec. 3490) as written is civil in nature and does not provide for a criminal penalty. See *United States ex rel Marcus v. Hess*, 317 U. S. 537 (1942) and *Rex Trailer Co.* v. *United States*, 350 U. S. 148 (1956). The entire proceedings in the district court and all stages of the subsequent appeals in this matter have been conducted as if this were a civil proceeding, and properly so.

The question then arises: to what extent may a claimant in a civil suit recover forfeitures from a defendant where there is an affirmative showing that there has been no damage to the plaintiff? This question it is submitted has never been directly passed upon by this Court.

This Court has held that a recovery of forfeitures may be had civilly where there is room to speculate as to the possible or probable amount of damages suffered by a claimant, although such damages are not shown, or offered to be shown. In the *Rex Trailer* case, *supra*, the Court likened the forfeiture provision of the False Claims Act to a provision for liquidated damages.

Upon the theory that the forfeiture provision of the False Claims Act in effect provides for liquidated damages, courts have permitted recovery of forfeitures in certain cases when damages have not been alleged or if alleged have not been recovered for failure of proof. See *United States* v. *Johnston*, 138 F. Supp. 525 (W. D. Okl, 1956) and *United States* v. *Rohleder*, 157 F. 2d 126 (3rd Cir. 1946).

In commenting upon such provisions, this Court has also pointed out that if a forfeiture or penalty provision is arbitrary and oppressive in its actual operation then it will contravene the Constitution. See *Chicago & Northwestern Rwy. Co.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35 (1922).

This Court has also held such a forfeiture provision unconstitutional when there is a gross disproportion between the possible actual damages and the amount of recovery. See *Missouri Pacific Rwy. Co.* v. *Tucker*, 230 U. S. 340 (1913).

If a provision for forfeiture is deemed arbitrary and oppressive in its application or grossly disproportionate to the possible actual damage to the government then this Court has stricken such a provision on the basis that it is a denial of due process of law. See *Southwestern Telephone & Telegraph Co.* v. *Danaher*, 238 U. S. 484 (1915).

The record contains no evidence upon which this Court or any other court can reach any other conclusion than that the application of the False Claims Act in this case is arbitrary, unreasonable, oppressive and bears no reasonable relationship to any possible actual damages to the government.

It should be noted that the government in its pleadings in this case attempted to recover every possible damage suffered by the government (R. 1a). Although proof was attempted upon this theory the trial court held that the government was entitled to nothing in the way of damages. What room is there left then to speculate upon the quantum of damages possibly suffered by the government in this case? The government has offered all the proof ever admissible on the question of damages and has merely proved that it can recover no damages. This being true, to what can we equate the $60,000.00 that the government is to recover in an attempt to judge its reasonableness and how can the result be anything but arbitrary and oppressive in such a circumstance? This Court pointed out in the *Hess* case, *supra*, that a recovery under the False Claims Act must bear some reasonable relation to the possible actual damage to the gov-

ernment and that the purpose of the Act was restitution. See 317 U. S. 551-552.

The fundamental error in the decision of the court of appeals is its conclusion that there is room for speculation and that the district court did not make a conclusive finding that there was no damage in this case. It escapes petitioners how the district court could have been more explicit in its finding. The court of appeals concluded further that the recovery here did not violate the Eighth Amendment as an excessive fine. Petitioners respectfully submit that such a recovery is certainly in the nature of a fine and is unquestionably excessive in the present circumstances.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

A. C. EPPS
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March 24, 1959

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7333

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO and MAGIE L. DUNN (nee: Magie L. Stone),
Appellants

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND

Order

BRYAN, District Judge:

The Fifth Amendment's due process clause, contend the appellants, bars recovery of the $164,000 and $60,000 claimed in these two cases, respectively, as the aggregate of forfeitures under the False Claims Act,* because of the peculiar circumstances here. This statute exacts $2000, aside from damages, from "every person who makes . . . any claim . . . against the Government of the United States knowing such claim to be false . . . or fraudulent". The circumstances stressed are the affirmative finding of the trial

* 31 USCA 231; however, in reference the original of this statute, R.S. 3490, should be used, and for the statute therein adopted R.S. 5438, should be used instead of the present 18 USCA 287, because the former incorporated the latter as it read at the date of the former's original enactment in 1878.

court in one case of no "legally recoverable damages", and the disallowance in the other also of all damages, to the Government.

Conceding the Act in the letter to be valid, the appellants contend that the imposition of such a plurality of forfeitures, 30 in the Cato case and 82 in Toepleman, in the absence of any commensurate damages, proved or unproved, is unconstitutional. If the forfeiture is not in some measure referable to the damages suffered, the argument is, then there is no lawful basis for the taking which the forfeiture makes of the defendant. Further, if the Congress may fix the forfeiture without relation to damages suffered, the appellants urge, the Congress could mulct a defendant so severely that it would be the equivalent of punishing him criminally, regardless of how the amercement is denominated; yet in its enforcement the defendant would be without the safeguards of a criminal trial. The underlying question, thus, is how far may Federal legislation go in levying a pecuniary civil sanction.

The $60,000 forfeitures in the Cato case were based on the forwarding of 30 letters by the defendant to the Commodity Credit Corporation, each containing at least one fraudulent promissory note for a cotton producer's loan. In Toepleman, the forfeitures of $164,000 were founded on 82 fraudulent cotton notes likewise presented to the Commodity Credit Corporation. The early history of both cases appears in 242 F. 2d 359 and 356 U. S. 595.

The Supreme Court has upheld forfeitures under the Act, the appellants readily admit, and has declared them to be civil in nature. *U. S. ex rel. Marcus* v. *Hess*, 317 U. S. 537 (1943); *Rex Trailer Inc.* v. *United States*, 350 U. S. 148 (1956). But the validity accorded the forfeiture was dependent in these decisions, the appellants insist, upon a showing both of an actual suffering of damages by the

United States and a fair ratio of forfeiture to damages—a loss and reasonable indemnity. The issue now according to the appellants is the question suggested, but left open, in the Rex Trailer opinion by its restricted, ad hoc conclusion that, "On this record it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty".

The ready response to the appellants' argument is that in neither case here does the trial court find that there was no injury or damages sustained by the Government. The strongest finding — "The plaintiff has not suffered any legally recoverable damages due to the action of the defendants." — does not in a fair reading purport to exclude all injury and damages. Clearly, the judge meant no more than that no calculable damage was shown. But, surely, no proof is required to convince one that to the Government a false claim, successful or not, is always costly. Just as surely, against this loss the Government may protect itself, though the damage be not explicitly or nicely ascertainable.

The Act seeks to reimburse the Government for just such losses. For a single false claim $2000 would not seem exorbitant. Furthermore, even when multiplied by a plurality of impostures, it still would not appear unreasonable when balanced against the expense of the constant Treasury vigil they necessitate. Obviously, the Congress in fixing this sum as the amount of the forfeiture cannot be justly accused of taking it without cause or due process. The statute merely draws the halter on those two, hand in hand impostors, damnum absque injuria and injuria absque damnum.

Reasonable indemnity, however, is not the only measure of the forfeiture's validity. Without converting it into a

criminal penalty, a statutory forfeiture of money has always been demandable of a wrongdoer by civil process though its purpose and effect be punishment. The opinion in the Hess case accepts the civil forfeiture as a common juristic discipline. 317 U. S. 537, 549-551, and concurring opinion, p. 554. Indeed, it is exampled in many of the Acts of Congress: 8 USCA 1321, 1322 and 1323, penalties imposed upon anyone illegally landing aliens; 26 USCA (I.R.C. 1954) 6653, fraud penalty of 50% for income tax underpayment; 45 USCA 73, pecuniary forfeiture for failure of carrier to unload livestock at intervals. These sanctions are so far civil in character that the trial, upon their enforcement, includes such civil attributes as a directed verdict for the Government and, for recovery, proof by a preponderance of the evidence instead of beyond a reasonable doubt. *Helvering* v. *Mitchell,* 303 U. S. 391, 400, note 3, 402 (1938); *U. S.* v. *Grannis,* 4 Cir., 172 F. 2d 507 (1949), cert. denied 337 U. S. 918.

Cognizance of civil punishments is found, too, in the procedural provisions of the United States Code. Thus, inter alia, in 28 USCA we note: sec. 1355, jurisdiction of "action or proceeding for the recovery or enforcement of any * * * forfeiture pecuniary or otherwise"; sec. 1395, venue of "a civil proceeding for the recovery of a pecuniary * * * forfeiture"; cost on any order for a "civil fine or forfeiture of property"; Chapter 163, secs. 2461 and 2462, mode of recovery of "civil fine, penalty or pecuniary forfeiture".

Many of the States have adopted similar statutes, sometimes for the benefit of the injured person and at others in the public interest. True, when their aim has been solely to prevent or heal injury, some State enactments have occasionally been struck down as over reaching their purpose. *C. & N. W. Ry.* v. *Nye etc. Co.,* 260 U. S. 35, 40 ff (1922).

But, when fraud has been their target, we know of no vitiating decision.

The statutory monetary forfeiture, for the use of either the injured sovereign or the injured citizen, is often likened to punitive damages recoverable in a civil action for a wilfull wrong. This likeness, as well as their dissimilarity to a criminal fine, is marked, too, by an immunity from imprisonment for their non-payment.

Of course, punitive damages are held in check by the judgment of a jury or a court, and, to be sure, there is no such rein in the determination of the amount of a statutory forfeiture. On the other hand, the quantum of a civil punishment, as is a criminal penalty, is fixed by the legislature alone. But, we know, an unjustly oppressive criminal penalty is subject to judicial review under the Eighth Amendment. So, while the Eighth Amendment has generally been thought to apply only to criminal cases; *N. A. Woodworth Co.* v. *Kavanagh*, 102 F. Supp. 9, 13, aff. 202 F. 2d 154 (1953 cir. 6); *U. S.* v. *Stangland*, cir. 7 242 F. 2d 843, 848 (1957) there would seem to be no basis in reason why a court could not invoke the Eighth Amendment, either specifically or by analogy, to prevent an abuse of the power of punishment though it be only manifested in a civil form. Cf. *Geffen* v. *Baltimore Markets*, 325 Pa. 509, 191 A. 24, 28. But we have found no abuse here.

In sum, the circumstances disclose no Constitutional frailty in the assessment of the instant forfeitures. As pointed out, they rest on actual damages, whether proved or unproved; they rest on a firm basis of a reasonable civil punishment; and they rest on a foundation combined of these two.

Cross-error has been assigned by the Government in the Toepleman case to the disallowance of the damages claimed

in its complaint. The fraud tainting the notes consisted of the representation by this appellant that the pledged cotton had been produced by the makers of the notes, when in truth it had not been. Of the original 82 fraudulent notes, 43 went into default at maturity.

The notes, collateraled by the warehoused cotton, were negotiated with the Commodity Credit Corporation in 1948. The fraud was discovered in 1949. In April 1950 appellant offered to redeem all of the cotton at the amount of the unpaid notes plus a sum for the investigation expense of the Government. At that time the cotton could have been sold on the market at a small profit. The offer was not accepted. It was renewed in August 1951; it was never accepted. The cotton was not foreclosed until January 1955 and then at a loss of $6733.97. During these six years the market price of the cotton fluctuated, some times exceeding and at other times falling below the amount of the loan. Settlement negotiations were in progress throughout the period.

Under the formula of the statute, the United States in this action sought double the amount of its loss on the cotton. But the trial judge concluded that the loss was not due to the fraud. He reasoned that "the loss here where the Government held the cotton over six years would have been exactly the same had every bale of the cotton been eligible for loan and, consequently, no false claims filed".

We cannot agree with the trial court in this aspect of the case. But for the fraud the cotton would never have been the Government's responsibility. Having by his fraud thrust this burden on the United States, the appellant cannot be exonerated by the failure of the Government to cast it off at the most propitious time. The fraud was the effecting cause of the loss, the drop in the market a foreseeable incident. The amount of the loss not being in controversy,

judgment must go for the Government against the appellant for twice that sum, an aggregate of $13,467.94.

We affirm the final orders in the Cato case; we affirm the orders in the Toepleman case in respect to the forfeitures decreed, but vacate it insofar as it disallows a recovery of damages, now remanding the action for entry of a judgment to include the damages as well as the forfeitures.

Order in accordance with opinion.

Judgment

(Filed and Entered January 23, 1959)

This Court having on February 28, 1957, entered its judgment in the above entitled cause reversing the judgment of the said District Court appealed from insofar as it gives judgment against defendants; and the Supreme Court of the United States having on May 26, 1958, entered its judgment reversing the judgment of this Court and remanding the cause to this Court for further proceedings not inconsistent with the opinion of the Supreme Court, and the said cause having at the October term, 1958, been argued by counsel:

It is now here ordered by this Court that the judgment of this Court, entered in this cause on February 28, 1957, be, and the same is hereby, set aside and held for naught; and that the judgment of the said District Court appealed from in this cause, be, and the same is hereby, affirmed in accordance with the opinion of the Court filed herein.

January 23, 1959.

Simon E. Sobeloff
Chief Judge, Fourth Circuit

Order Staying Mandate

Upon the application of the appellants, by their counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled case be, and it is hereby, stayed pending the application of the appellants in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed in the Supreme Court within 30 days from this date.

February 24, 1959.

Simon E. Sobeloff
Chief Judge, Fourth Circuit

IN UNITED STATES DISTRICT COURT

Richmond Civil No. 1841

June 21, 1956

Letter Opinion of Court

Gentlemen:

Re: United States v. Cato Brothers, Incorporated — Richmond Civil No. 1841 —

Upon consideration of the record, argument and briefs of counsel, I have reached the following conclusions concerning the above captioned case:

1. All defendants named violated the provisions of the Commodity Credit Corporation Act by filing and causing to be filed with the corporation claims based upon notes covering cotton produced by others;

2. The liability of the defendants is joint and several;

3. The Government may not recover for any loss sustained in the sale of the cotton involved, because:

(a) The cotton was held by the Government for an unreasonably long period of time during which it could have been sold at a profit and loss avoided; and

(b) The Government failed to accept the offer of the defendants to re-purchase the cotton at the price paid by the Government and thereby avoid a loss.

4. The liability of the defendants is $2,000.00 forfeiture for each violation of the Act.

5. The forfeitures for which the defendants are liable are $2,000.00 for each of the 31 letters transmitting notes signed by producers of the cotton.

6. The Court has no authority to mitigate or remit any part of the forfeitures provided by the Act.

7. Judgment should be entered in favor of the Government against the defendants jointly in the sum of $62,000.00.

See *United States, ex rel Marcus* v. *Hess*, 317 U. S. 537; *Rex Trailer Company* v. *United States*, 350 U. S. 148; and *United States* v. *Grannis*, 172 Fed. (2d) 507.

It has been my purpose to prepare and file a memorandum in lieu of findings of fact and conclusions of law. [fol. 121] However, due to some unanticipated matters, to do so would cause additional delay. Therefore counsel are requested to submit drafts of proposed findings of fact and conclusions of law, and judgment order, in accordance with the foregoing.

Very truly yours,

(s) Sterling Hutcheson
United States District Judge

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MAR 24 1958
JAMES R. BROWNING

No. 797

In the Supreme Court of the United States

OCTOBER TERM, 1958

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO AND MAGIE L. STONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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508243—59

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 797

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO AND MAGIE L. STONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The letter opinion (Pet. App. 8–9) and the findings of fact and conclusions of law (A. 2–5)[1] of the district court are not reported. The prior opinion of the court of appeals is reported at 242 F. 2d 359, and the opinion of this Court remanding the case to the court of appeals is reported at 356 U.S. 595. The opinion of the court of appeals on remand (Pet. App. 1–7) is not as yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1959 (Pet. App. 7). The petition for

[1] "A" refers to the appellants' appendix in the court of appeals on remand; "R.", to the original record in the court of appeals.

a writ of certiorari was filed on March 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the award of $2000 to the United States under the civil False Claims Act for each of thirty separate false claims presented by petitioners to the Commodity Credit Corporation violated due process of law.

STATUTE INVOLVED

The civil False Claims Act (12 Stat. 696, 698, R.S. 3490, 5438, 31 U.S.C. 231) provides in relevant part:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance

> of any false or fraudulent claim, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

STATEMENT

Petitioners, a corporation and its three principal directors, officers, and shareholders, were engaged in the business of cotton ginning and warehousing in Emporia, Virginia (A. 2–4). On August 3, 1948, the Commodity Credit Corporation entered into a Lending Agency Agreement with the petitioner corporation, pursuant to the Stabilization Act of 1942 (56 Stat. 765, 767) and the Commodity Credit Corporation Charter Act (62 Stat. 1070). The agreement authorized the corporation, as Commodity's agent, to make non-recourse loans to producers of eligible 1948 crop cotton (A. 3). Together with the applicable Department of Agriculture regulations (1948 Cotton Loan Instructions, 13 F.R. 4338), it also authorized the corporation to obtain executed Cotton Producers' Notes, as well as warehouse receipts covering the cotton pledged by the borrower producers as security for the loans (R. 4–5).

Each note was required to contain, *inter alia*, a certification by its maker that he had produced the cotton on which the loan was to be made (R. 4). The Agreement provided that the agent would disburse the face amounts of the notes and thereafter transmit the notes

to Commodity (R. 5). Commodity, in turn, would repay the agent the amounts which it had previously disbursed plus interest at the rate of 1½ percent per annum from the date of the execution of the notes to the date of payment by Commodity (R. 5). The Agreement required the agent, in transmitting the notes, to certify that the representations by the maker were true to the best of the agent's knowledge and belief and that the cotton listed on the note was "eligible" cotton as defined in the 1948 Cotton Loan Instructions (R. 4–7).

Between September 1, 1948 and November 30, 1948, petitioners induced a number of bona fide cotton producers to sign more than 280 cotton producer note forms in blank (R. 6). On these forms, petitioners listed the warehouse receipt numbers of cotton which petitioners had purchased from various sources, but which had not been produced by the makers of the notes (R. 6). The forms were completed by petitioners with the following statements falsely certified therein: that the note makers had produced the cotton; that the benefits of the loan evidenced by the notes would accrue solely to the note makers and any tenants and sharecroppers having an interest in the cotton; and that the benefits of the loan had not been transferred to any other party (R. 7). In addition, petitioner Magie L. Stone, acting with the knowledge and consent of the other petitioners, made the required certification with respect to each note that the above statements (purportedly made by the producers) were correct to the best of her knowledge and belief, and that the cotton was "eligible" (R. 7–8).

Petitioners received payment on the fraudulent notes together with 1½ percent interest—the fee provided as compensation for the use of the money purportedly disbursed by them to the producers (R. 8). Petitioners made no disbursements to the producers—the latter having no interest in the pledged cotton—but rather retained for themselves the Commodity payments (R. 8).

On October 28, 1953, the United States brought this suit under the False Claims Act, 31 U.S.C. 231, in the District Court for the Eastern District of Virginia. The amended complaint sought $2,000 for each false claim submitted by petitioners and double damages, as prescribed by the Act. Following trial, the district court found (A. 4) that petitioners had transmitted false notes to the Commodity Credit Corporation in thirty letters of transmittal, each of which contained at least one fraudulent note. It determined that each of these letters, along with the accompanying notes, constituted a false claim upon the United States under the False Claims Act, and held petitioners "jointly and severally liable to the United States of America in the amount of a Two Thousand Dollar ($2,000.00) forfeiture for each of the * * * thirty (30) letters of transmittal * * *". (A. 5).

The Government's complaint had alleged that, as the result of petitioners' fraud, it had suffered a net loss, after sale of the cotton, of $31,598.59 and had paid $129.29 as interest to which petitioners were not entitled (R. 28). The district court found, however,

that the cotton had been held by Commodity "for an unreasonably long time, during which time it could have disposed of the said cotton at a profit" and that Commodity "failed to accept the offer of the defendants to repurchase the cotton at the price paid for the cotton by the said Corporation" (A. 4). On the basis of these findings it held that the Government "has not suffered any legally recoverable damages due to the actions of the defendants" (A. 5).[2] The court further concluded that, notwithstanding the fact that the United States had suffered no actual damages which were "legally recoverable," the "recovery by plaintiff of Sixty Thousand Dollars ($60,000.00) in forfeitures is Constitutional as a civil remedy * * *" (A. 5).

The court of appeals first reversed on the sole ground that a false claim against the Commodity Credit Corporation is not within the ambit of the False Claims Act. 242 F. 2d 359. This Court reversed that decision *sub nom. United States* v. *McNinch*, 356 U.S. 595, and remanded the cause to the court of appeals "for further proceedings not inconsistent with this opinion." 356 U.S. at 600.

On remand, petitioners contended that, in view of the district court's unappealed finding that the Government had suffered no "legally recoverable" damages, the $60,000 judgment deprived them of property without due process of law in contravention of the Fifth Amendment. The court of appeals rejected this argument and affirmed the judgment of the dis-

[2] No appeal was taken by the Government from this determination.

trict court.[3] It held that the district court's finding was not to be construed as a determination that the Government had not been injured and legally damaged by petitioners' fraud, stating that "the judge meant no more than that no calculable damage was shown." (Pet. App. 3). Observing that "no proof is required to convince one that to the Government a false claim, successful or not, is always costly", it concluded (Pet. App. 3):

> For a single false claim $2,000 would not seem exorbitant. Furthermore, even when multiplied by a plurality of impostures, it still would not appear unreasonable when balanced against the expense of the constant Treasury vigil they necessitate. Obviously, the Congress in fixing this sum as the amount of the forfeiture cannot be justly accused of taking it without cause or due process.

ARGUMENT

Petitioners contend that the $60,000 recovery is so disproportionate to any possible damage suffered by the Government that the Act as so applied violates the due process clause of the Fifth Amendment.[4] The district court did not, however, as petitioners contend,

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[3] The opinion of the court of appeals also disposed of the appeal and cross-appeal in *Toepleman* v. *United States*, which had been remanded by this Court along with the instant case.

[4] Petitioners also contend (Pet. 9) that the judgment is unconstitutional as an "excessive fine" under the Eighth Amendment. This point was not raised in either of the courts below and is therefore not before this Court. In any event, the considerations which require rejection of petitioners' claim under the Fifth Amendment would apply with equal force to their claim under the Eighth Amendment.

find that the Government suffered no injury from the fraud. It found only that, because of its failure to mitigate damages by promptly selling the cotton or accepting petitioners' offer to repurchase it, the Government could "not recover for any loss sustained in the sale of the cotton" (Pet. App. 9)—*i.e.*, it had not sustained any "legally recoverable" damages (A.5). That finding, as the court of appeals observed, does not "exclude all injury and damages" but only provable damages (Pet. App. 3). It is fully consistent with the existence of unprovable elements of injury justifying the statutory recovery—*e.g.*, the unjust enrichment to the defrauder, the inevitable but immeasurable damage to the public interest, and the Government's costs of administration and enforcement. Here, moreover, the Government admittedly suffered a direct financial loss of $31,598.59 on the sale of the cotton. That loss was no less real because not separately recoverable and negatives any claimed disparity between the recovery and the damage to the Government.

In any event, neither a showing nor a finding of possible damage to the Government is required to support the statutory damages provided for by the False Claims Act. It is established by the decisions of this Court that the prescribed damages of $2,000 represent a reasonable approximation by Congress of the incalculable injury likely to result from such false claims. As such, they may be recovered as liquidated damages whether or not actual damage can be shown in the particular case. In *United States ex rel.*

Marcus v. *Hess*, 317 U.S. 537, the Court, recognizing that the damages sustained by the Government from violations of the False Claims Act are difficult of precise ascertainment, confirmed the reasonableness of the $2,000 provision. It held (pp. 551–553):

> • • • We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. • • • The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress.

Similarly, in *Rex Trailer Co.* v. *United States*, 350 U.S. 148, the Court upheld an award of fixed statutory damages of $2,000 for each of five transactions in which the defendant had violated Section 26(b)(1) of the Surplus Property Act of 1944, 58 Stat. 765, stating (350 U.S. at 152–153):

> • • • The Government's recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss; • • • there is no requirement, statutory or judicial, that specific damages be shown, and this was recognized by the Court in *Marcus*. • • •

See also *Kofler* v. *United States*, No. 362, this Term, decided April 20, 1959. These cases clearly establish that proof of actual damage is irrelevant. Indeed, as this Court observed in *Rex Trailer*, the decision in *Marcus* had upheld an award of statutory damages on several claims which in fact had never been paid

by the Government and on which, for that reason, no actual damage could be shown. 350 U.S. at 153, n. 5.[8]

The damages awarded here were based upon 30 separate and distinct violations of the False Claims Act. Although the 30 letters of transmittal contained a total of 748 notes (A. 4) of which undoubtedly more than 30 were fraudulent, only a single statutory recovery was sought and granted for each transmittal letter. Whether or not each fraudulent note submitted to Commodity for payment could constitute an independent fraud, clearly each transmittal letter, submitting different notes at different times over a three-month period, was a distinct and individualized fraud for which the allowance of the statutory damages was both reasonable and proper.

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[8] As petitioners themselves concede, the lower federal courts have also uniformly held that the United States may recover $2,000 for each false claim under the False Claims Act despite the fact that actual "damages have not been alleged or [as in this case] if alleged have not been recovered for failure of proof" (Pet. 7). See, *e.g.*, *United States* v. *Rainwater*, 244 F. 2d 27, 28 (C.A. 8), affirmed, 356 U.S. 590; *United States* v. *National Wholesalers*, 236 F. 2d 944 (C.A. 9), certiorari denied, 353 U.S. 930; *United States* v. *Tieger*, 234 F. 2d 589, 590 (C.A. 3), certiorari denied, 352 U.S. 941; *United States* v. *Rohleder*, 157 F. 2d 126 (C.A. 3); *United States* v. *Ben Grunstein & Sons Co.*, 127 F. Supp. 907, 912 (D.N.J.); *United States* v. *Johnston*, 138 F. Supp. 525, 528 (W.D. Okla.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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